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IN THE

Supreme Court of The United States

No. 250

STITZEL-WELLER DISTHLLERY, a Kentucky Corporation ---------- PETITIONER

versus

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY---------- RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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Supreme Court of The United States

No.

STITZEL-WELLER DISTILLERY, A KENTUCKY CORPORATION ..... *Petitioner*

versus

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY ..... *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

QUESTION PRESENTED

The question presented is whether, on the facts of this case, a state occupational tax on the privilege to manufacture distilled spirits where a percentage of such spirits is later separated for export, violates Art. I, Sec. 8, Cl. 3 (Commerce Clause) or Art. I, Sec. 10, Cl. 2 (Import-Export Clause) of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Art. I, Sec. 8, Cl. 3 of the Constitution of the United States:

"The Congress shall have power . . .;

"To regulate commerce with foreign nations, and among the several states, and with Indian tribes."

Article I, Sec. 10, Cl. 2:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net proceeds of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States: and all such laws shall be subject to revision and control of the Congress."

Kentucky Revised Statutes Sec. 243.680 (1):

> "No person shall manufacture distilled spirits in this State unless he first obtains from the Department a permit to engage in the business of manufacturing distilled spirits. At the time of the issuance of the permit he shall pay to the State a tax of ten cents for each proof gallon of distilled spirits for which the permit is issued."

STATEMENT

Petitioner is a manufacturer of distilled spirits and is duly licensed as such under the laws of the United States and the Commonwealth of Kentucky. The petitioner is negotiating a contract with a customer in Mexico to manufacture for such customer fifteen barrels of bourbon whiskey.

When the whiskey is manufactured, it will be entered into plaintiff's Class Six United States Customs Bonded Warehouse.

Petitioner's quoted price to its customer in Mexico is based upon the cost of all manufacturing expenses including all applicable taxes and a reasonable profit.

The whiskey when manufactured will be "drawn off" into barrels containing all identifying marks and brands required by Internal Revenue and United States Customs Laws and Federal Exportation Liquor Regulations.

REASONS WHY THE PETITION SHOULD BE DENIED

The Kentucky Court of Appeals held against the petitioner in an opinion officially reported in 387 S.W. 2d 602 and denied its petition for rehearing on March 26, 1965.

It is the respondent's contention that this decision does not violate any provision of the United States Constitution and that the assumptions of fact and conclusions of law arrived at by the Kentucky Court of Appeals were neither erroneous nor false as contended by the petitioner.

(1) The Kentucky Court of Appeals stated that the stipulated facts show that the whiskey in question will be manufactured and "drawn off" before it is placed into the United States Customs Bonded Class Six Warehouse. The court correctly concluded that the whiskey will not be committed to the stream of exportation with certainty until it has been segregated from the common mass of distilled spirits and placed in this warehouse.

(2) Furthermore, the Kentucky Court of Appeals, by implication, construed the statute in question, KRS 243. 680 (1), to be an occupational tax which is levied as a condition precedent to the manufacture of whiskey. See Brown-Forman Distillery Corporation v. Commonwealth, Ky. 346 S.W. 2d 752 (1961). This tax attaches before manufacturing begins; therefore, it necessarily follows that it is impossible for the product to be in the export stream before it comes into existence.

(3) The Kentucky Court of Appeals did not, as contended by the petitioner, decide this case in a manner inconsistent with two prior decisions of this Court. McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940); Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946). In these cases taxes attached to property after it was in existence. This line of decisions has consistently held that property must be separted from the common mass of property and committed with certainty to the export stream.

(4) Petitioner is mistaken as to the facts of the instant case. In his petition on page two the Question Presented contains the following phrase, ". . . *as applied to whiskey manufactured under a contract.* . . ." (Emphasis added.) It must be pointed out that nowhere in the stipulation of facts or record is a contract shown to exist. Advisory opinions have long been denied as a basis for granting writs of certiorari. No tax has been paid, and it is somewhat doubtful whether a decision by this Court would affect the instant case, as the proposed contract may never be executed by the petitioner. Any decision by this Court in this case would, therefore, be purely speculative in nature.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

I hereby certify that on this 5th day of July, 1965, a copy of this Brief in response to Petitioner's petition for writ of certiorari was mailed to counsel for Petitioner.

William S Riley

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